

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
W.D.N.Y. BUFFALO

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ROBERT CLAY McFADDEN, 113117-055,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

01-CR-0167E
06-CV-0042E
MEMORANDUM and ORDER

Petitioner, Robert Clay McFadden, acting *pro se*, seeks relief pursuant to 28 U.S.C. § 2255, alleging that his conviction in this Court was unconstitutionally or unlawfully obtained, as set forth more precisely in the petition. By Order filed January 27, 2006, petitioner was directed to file information addressing the issue of the timeliness of the motion under 28 U.S.C. § 2255, which imposes a one-year statute of limitations on the filing of § 2255 motions. He filed his response on February 27, 2006 (Docket No. 69). Based on a review of his petition and the response, the Court cannot find at this time that the petition is untimely. Accordingly,

IT HEREBY IS ORDERED as follows:

1. Pursuant to Rules 4 and 5 of the Rules Governing Section 2255 Proceedings in the United States District Courts, the United States Attorney is ordered to file and serve an **answer** to the petition no later than **June 12, 2006**. The answer shall respond to the allegations of the petition and shall state whether petitioner has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. Further, the answer shall state whether an evidentiary hearing was afforded petitioner in a federal court, whether petitioner appealed the conviction, and what ruling, if any, the United States Court of Appeals has made on the appeal.

Respondent is also ordered to file and serve by the above date a **memorandum of law** addressing each of the issues raised in the petition and including citations of relevant supporting authority.

2. Petitioner shall have twenty (20) days upon receipt of the answer to file a written response to the answer and memorandum of law.

3. Within twenty (20) days of the date this order is filed with the Clerk of Court, respondent may file a motion for a more definite statement or a motion to dismiss the petition, accompanied by appropriate exhibits which demonstrate that an answer to the petition is unnecessary. The timely filing of such motion shall extend the time for filing an answer for fourteen (14) days, but the failure of the Court to act upon the motion within that time shall not further extend the time for filing an answer.

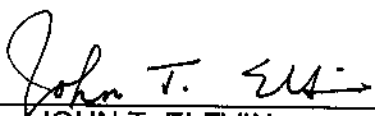
4. The Clerk of Court is directed to serve a copy of the application, together with a copy of this order, upon the United States Attorney for the Western District of New York, 138 Delaware Avenue, Buffalo, New York 14202.

5. All docketing for this action shall be made in the related criminal action 01-CR-0167E.

PETITIONER MUST FORWARD A COPY OF ALL FUTURE PAPERS AND CORRESPONDENCE TO THE UNITED STATES ATTORNEY.

SO ORDERED.

DATED: Buffalo, New York
April 28, 2006



JOHN T. ELFVIN
UNITED STATES DISTRICT JUDGE